DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
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DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. AGAPE CABBAGE PATCH/LE MAE EARLY CHILD DEVELOPMENT CENTER and FRANCERIS PROCTOR Respondents	Case Nos.: I-00-40015 I-00-40281

AMENDED FINAL ORDER

The procedural history of this case is summarized as follows.[1] The record indicates that the Government served a Notice of Infraction (00-40015) upon Respondents, Agape Cabbage Patch/ Le Mae Early Child Development Center and Franceris Proctor, alleging a violation on May 12, 2000 of 29 DCMR 325.13. That regulation requires that child development facilities ensure that their employees comply with certain minimum health standards. In this instance, the Government alleged that Respondents failed to keep current with the requirement that their employees undergo annual physical exams. The Government sought a fine of $500 pursuant to the authority of 16 DCMR § 3221.1(r).

Respondents failed to file an answer and enter a plea to the Notice of Infraction within the required period (fifteen days plus five additional days pursuant to D.C. Code § 6-2715). Consequently, on July 19, 2000, this administrative court issued a notice finding Respondents in default and assessing the statutory penalty of $500.00 pursuant to D.C. Code § 6-2712(f). On

November 21, 2000, the Government served a second Notice of Infraction (00-40281) on the Respondents. Respondents failed to answer or otherwise properly respond as required by the instructions contained on the Notice of Infraction and by D.C. Code §§ 6-2712(f). Accordingly, on December 22, 2000, the administrative court issued a Final Notice of Default based upon Respondent's failure to respond to either the first or second Notice of Infraction. In the Final Notice of Default, an additional penalty of $500.00 was assessed against the Respondents pursuant to D.C. Code § 6-2704(a)(2) and § 6-2712(f) for failing to respond to the second Notice of Infraction. This amounts to a total of $1,000.00 in statutory penalties.

The Final Notice of Default provided notice that the presiding administrative judge would conduct an *ex parte* proof hearing on January 17, 2001 at 2:00 P.M. as required by D.C. Code §§ 6-2713(a)-(b) after which time a Final Order would be issued. Neither party sent a representative to appear on its behalf at the scheduled hearing. Subsequently, this administrative court issued a Final Order on January 29, 2001, finding that the Government had failed to meet its burden of proof and dismissing the charged infraction with prejudice. The Final Order did not, however, modify the mandated statutory penalties that had been assessed against Respondents in the amount of $1,000.00 pursuant to D.C. Code § 6-2704(a)(2) and § 6-2712(f).

On February 12, 2001, in response to the Final Order, the *pro se* Respondents submitted a document styled as an "appeal statement" which appeared to be a timely motion seeking reconsideration of the Final Order.[2] In this statement, Respondents stated that although they failed

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[1] A more detailed history is contained in the administrative court's order of January 29, 2001.

[2] This construction was confirmed by Respondent's submission filed on February 26, 2001. *See Dilal v. Kaplan* 956 F.2d 856, 857 (8th Cir. 1992) (supporting liberal construction of *pro se* motions) *See also, Badde v. Strickland,* 175 F.R.D. 403, (D.D.C. 1997) (*pro se* submissions should be liberally construed by trial courts).

to respond to the first Notice of Infraction (00-40015), they attempted to correct the substantive violation of the infraction by faxing certain employee health forms to the DOH Health Regulation Administration. They further assert that they faxed this information to the Government in advance of its issuing the second Notice of Infraction (00-40281). The Government has not submitted any evidence contradicting or challenging these assertions. In a responsive submission dated May 17, 2001, the Government does not dispute that the required information was ultimately transmitted, but reasserts the provision of the information was tardy, and therefore asks that a fine of $250.00 be imposed. In light of the result reached in this case on reconsideration, and the failure of the charging inspector to appear for the trial of this matter, the administrative court declines to impose the fine of $250.00.

On reconsideration, a review of applicable authorities by the administrative court has led to the conclusion that the Government's unexplained failure to appear for trial is in the nature of an abandonment of the prosecution of this matter rather than a failure of proof. *See* SCR Civil Rule 41(b). Although both types of dismissal are covered by Rule 41(b) and its underlying doctrines, and both will ordinarily result in a dismissal with prejudice, the distinction has significant consequences in a case brought under the Civil Infractions Act. D.C. Code § 6-2701, *et seq.* This is so because the statutory penalties that arise when a respondent fails to submit a timely answer will ordinarily survive a dismissal for failure of proof, but will not survive a dismissal for want of prosecution, which is in the nature of an abandoned prosecution that terminates the case.[3]

[3] The descriptive terms "want of prosecution" and "failure of proof" should not be read as an indication of what preclusive effect, if any, should be given to a dispositive order, except that a dismissal on either ground will (unless otherwise noted) bar a new notice of infraction prosecution for the identical violation. *Semtek International, Inc v. Lockheed Martin Corp,* - U.S. -; 121 S. Ct. 1021, 1026-27 (2001).

Under D.C. Code §§ 6-2711-2713, it is clear that the burden of charging, prosecuting, and proving a civil infraction rests squarely on the Government throughout a case. S*ee also, e.g.*, *DOH v. Palace Cleaners*, No. I-00-20131 (December 9, 2000); *DOH v. Ms. Crawford*, No. I-00-40228 (December 9, 2000)**.** While determination of the appropriate category of dismissal is necessarily fact-bound in the history of the case, the guiding determination is whether the Government has failed to make reasonable efforts to meet the requirements for the proper prosecution of the case. Such failure is properly deemed a "want of prosecution." *See e.g.* SCR Civil Rule 41(b); *Weissenger v. United States*, 423 F.2d 795, 796-98 (5th Cir. 1970). On the other hand, if despite making such efforts, the Government has been unable to prove its case by a preponderance of the evidence, a dismissal for failure of proof is appropriate under D.C. Code § 6-2713(a). S*ee id; cf. DOH v. L'Arche, Inc.*, No. I-00-10413 (July 28, 2000) at 2, (recognizing that a dismissal for want of prosecution may be appropriate in cases in which the Government offers a witness, but is aware in advance that the witness lacks knowledge of the facts necessary to prove the case). In this case where the Government failed to appear for trial and even to this day has failed to explain its absence, under such circumstances a dismissal for want of prosecution is warranted. *See* SCR Civil Rule 41(b); *Weissenger v. United States*, 423 F.2d at 796-98.

Based on Respondent's motion for reconsideration, and the entire record in this case, it is, this _____ day of _____, 2001:

ORDERED, that Respondents timely motion for reconsideration is **GRANTED** and the infraction is **DISMISSED** and the statutory penalties assessed in the Order of December 22, 2000 are hereby **VACATED**; and it is further

ORDERED, that the administrative court's Final Order of January 29, 2001, is hereby **VACATED**.

/s/ 5-24-01

Paul Klein
Chief Administrative Law Judge